

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 18-753V
(Unpublished)

On April 15, 2019, Respondent filed a Rule 4(c) Report stating that this case is not appropriate for compensation pursuant to the Vaccine Act. Resp't's Rep. at 2, ECF No. 17. More specifically, Respondent stated that

[P]etitioner has not provided evidence that satisfies her burden under *Althen*. Petitioner has not offered the medical opinion of a qualified expert showing that the flu vaccine can cause her alleged injury, and that it did so in this instance. Nor do the medical records provide evidence sufficient to meet petitioner's burden of proving the prima facie elements of her claim. Most notably, none of petitioner's treating physicians ever attributed her PMR to her vaccination.

Id. at 6-7.

On August 21, 2019, Petitioner filed an expert report written by Dr. Eric Gershwin. Ex. 11. On January 2, 2020, Respondent filed an expert report written by Dr. Mehrdad Matloubian. Ex. A. On February 4, 2020, Petitioner filed a supplemental expert report from Dr. Gershwin. Ex. 13. On July 1, 2020, Respondent filed a responsive expert report from Dr. Matloubian. Ex. D. On October 2, 2020, Petitioner filed another supplemental expert report from Dr. Gershwin. Ex. 15. On March 22, 2021, Respondent filed another responsive report from Dr. Matloubian. Ex. E. On April 20, 2021, Petitioner filed a final expert report from Dr. Gershwin. Ex. 24.

On June 2, 2021, I held a status conference with the parties to discuss my preliminary views of this case. Scheduling Order on 6/2/2021, ECF No. 39. I informed the parties that I was not persuaded that the flu vaccine can cause PMR. *Id.* Petitioner has presented case study evidence to support her prong one theory. *Id.* Furthermore, the etiology of PMR is unknown and it does not appear to be a post-infectious disease. *Id.* During this status conference, I recommended that Petitioner dismiss her case. *Id.* Petitioner's counsel requested 30 days to file a status report indicating whether Petitioner would file a motion to dismiss her petition. *Id.* Petitioner's counsel filed several motions for an extension. ECF Nos. 40, 41, 42. I granted those motions. *See non-PDF Orders* granting petitioner's motion for an extension of time on 7/6/2021, 8/4/2021, and 9/2/2021.

Petitioner filed the instant motion to dismiss her claim on October 5, 2021, stating "In these circumstances, to proceed further would be unreasonable, and would waste the resources of this Court, Respondent, and the Vaccine Program." Pet'r's Mot. at 3, ECF No. 43.

II. Conclusion

To receive compensation in the Vaccine Program, a petitioner must prove either (1) that she suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to her vaccination, or (2) that she suffered an injury that was actually caused by a vaccine. *See* §§ 13(a)(1)(A) and 11(c)(1). Moreover, under the Vaccine Act, a petitioner may not receive a Vaccine Program award based solely on her claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent medical expert. § 13(a)(1). In this case, however, there is insufficient evidence in the record for Petitioner to meet her burden of proof. Petitioner's claim therefore cannot succeed and, in accordance with her motion, must be dismissed. § 11(c)(1)(A).

As such, **IT IS ORDERED THAT,**

Petitioner's motion for a decision dismissing her petition is **GRANTED** and the petition is hereby **DISMISSED. The Clerk shall enter judgment accordingly.**

Any questions regarding this Order may be directed to my law clerk, Sydney Lee, by telephone at 202-357-6347, or by email at Sydney_Lee@cfc.uscourts.gov.

IT IS SO ORDERED.

s/ Katherine E. Oler

Katherine E. Oler
Special Master